

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

DAVID A. MCCALLISTER,)	
Individually and as)	
Executor of the Estate of)	
ELEANOR W. MCCALLISTER,)	
KENNETH MCCALLISTER,)	C.A. No. N20C-05-255 JRJ
WAYNE MCCALLISTER, and)	
LIFE FORCE CAREGIVERS, INC.,)	
)	
Plaintiffs,)	
)	
v.)	
)	
ARCH INSURANCE COMPANY,)	
)	
Defendant.)	

MEMORANDUM OPINION

Date Submitted: December 21, 2021
Date Decided: March 18, 2022

*Upon Plaintiff McCallister's Motion for Partial Summary Judgment on Count One of the Complaint: **GRANTED.***

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Jurden, P.J.

This insurance coverage dispute arises from the injury and subsequent death of Eleanor McCallister due to the negligence of an employee of Life Force Caregivers, Inc. (“Life Force”).¹ Defendant Arch Insurance Company allegedly breached its obligations under an insurance policy Arch sold to Life Force when Arch declined coverage for the *McCallister* Claims.² Following Arch’s denial of coverage, the McCallisters and Life Force initiated this civil action and filed a “Stipulation to Arbitrate and Assign Certain Claims.” (“Stipulation”)³ Pursuant to the Stipulation, the McCallisters and Life Force agreed to, *inter alia*: (1) submit the *McCallister* Claims to binding arbitration solely on the issue of damages; (2) file an entry of judgment against Life Force in the amount of the arbitration award; (3) mark the judgment satisfied once the McCallisters have exhausted all reasonable attempts to collect on the judgment from the insurer; and (4) file this Stipulation with the Court.⁴ Following a two-day arbitration hearing, the arbitrator awarded damages on the survivorship/pain and suffering claim of Eleanor McCallister and the wrongful death claims of the other McCallister plaintiffs, along out-of-pocket and

¹ *McCallister, et. al. v. Life Force Caregivers, Inc., et. al.*, C.A. No. N16C-11-053 JRJ (Trans. ID. 59792529) (“McCallister Action”). The Plaintiffs in the McCallister Action are hereinafter referred to as the “McCallisters” and the claims in the McCallister Action are hereinafter referred to as the “McCallister Claims.”

² The “Professional Liability Coverage Form” for the insurance policy at issue is attached as Exhibit D (“Ex. D”) to Plaintiffs’ Motion for Partial Summary Judgment on Count One of the Complaint (“Mot.”) (Trans. ID. 66742124). The Arch insurance policy in its entirety is attached as Ex. A to Plaintiffs’ Complaint (“Compl.”) (Trans. ID. 65665013).

³ See Ex. F to Mot. (Trans. ID. 66742124).

⁴ *Id.*

medical expenses.⁵ Arch refused to pay the arbitrator's award, and the McCallisters filed the instant suit against Arch seeking declaratory relief, as well as compensatory and punitive damages for bad faith breach of Arch's obligations under the Policy. The McCallisters have now moved for summary judgment on Count I of their Complaint: Declaratory Judgment.⁶ For the reasons explained below, the McCallisters' motion is **GRANTED**.

II. BACKGROUND

A. The McCallister Claims

Eleanor McCallister was a patient of Life Force, a home healthcare agency, when she was struck by a vehicle and injured on March 23, 2016.⁷ Life Force submitted the claim to its then current insurer, Great American Insurance Group ("Great American"), which denied coverage because its policy was an occurrence policy that only covered events that "occurred" between April 1, 2016 and April 1, 2017.⁸ Life Force then notified Defendant, its previous insurer prior to Great American. Defendant denied coverage of the claim on the basis that the claim "was

⁵ See Ex. G to Mot. (Trans. ID. 66742124).

⁶ Mot., at 1.

⁷ Compl. at ¶ 11-17. Eleanor McCallister's injuries included bilateral subdural hematomas, multiple bone fractures, and a stroke. She received continuous treatment for her injuries until her death on January 7, 2017.

⁸ Ex. B to Mot., at 1 (Trans. ID 66742124) ("Coverage for this claim is being sought under the liability policy that you organization carries with Great American, PAC 1110250, with effective dates of April 1, 2016 through April 1, 2017. This letter is to advise you that there is no coverage available to your organization under this policy. The allegations made against your organization in this complaint all precede the effective date of the Great American policy.").

not made until the complaint was filed November 2016, approximately seven months after the policy expired.”⁹

B. The Arch Policy

In 2015, Arch issued a “claims made” insurance policy to Life Force that covered claims made between April 1, 2015 and April 1, 2016 (“Policy”).¹⁰ Section V of the Policy contains an Extended Reporting Period.¹¹ Under the Extended Reporting Period, an eligible insured may receive an additional twelve months of coverage from the expiration of their insurance policy in particular circumstances:

2(a). If we cancel or do not renew for any reason, other than nonpayment of premium, a one year Extended Reporting Period will be automatically provided without an additional premium charge. In the event of such cancellation or non renewal, the following additional provision shall be applicable to Part 1. Of SECTION 1 -COVERAGE:

d. A claim is first made within twelve (12) months after the policy period ends will be deemed to have been made on the last day of the policy period, provided the claim is for “damages” because of a “professional incident” that did not occur before the Retroactive Date, if any, shown in the Declarations or after the end of the policy period.¹²

3(a). If you cancel or non renew, or if cancellation or non renewal is for nonpayment of premium, you shall have the right, upon payment of additional premium of 25% of annual premium to a one year Extended Reporting Period, provided, however, that the request for this extension must be made to us in writing and payment of the additional premium

⁹ See Ex. C to Mot. (Trans. ID 66742124).

¹⁰ Compl. at ¶¶ 1, 7; See Ex. D to Mot. (Trans. ID 66742124).

¹¹ Ex. D to Mot., at 10-11.

¹² *Id.* at 10-11.

must be made to us within 60 days following the date of such cancellation or nonrenewal.¹³

The Policy further provides that a claim “will be deemed to have been made when notice of such claim is received and recorded by any insured or by us, whichever comes first.”¹⁴

C. Non-Renewal of the Arch Policy

On January 28, 2016, Arch sent Life Force a “Notice of Non-renewal of Insurance” (“Notice of Non-renewal”)¹⁵ stating, “[w]e will not renew this policy when it expires...[t]he reason for nonrenewal is that the Program is implementing a change in carriers.”¹⁶

D. The Stipulation

The McCallisters and Life Force entered into the Stipulation on January 17, 2018, following Arch’s denial of coverage on the McCallister Claims.¹⁷ With regard to the assignment of claims, the Stipulation states, “Life Force hereby agrees to assign to Plaintiffs: any and all of its rights to pursue collection of the Judgment entered against it from any and all sources other than Life Force....”¹⁸ In return for the

¹³ *Id.* at 11.

¹⁴ *Id.* at 2 (Section I(1)(c)).

¹⁵ The “Notice of Nonrenewal” at issue is attached as Ex. E to Mot. (Trans. ID. 66742124).

¹⁶ *Id.* Life Force would later obtain “occurrence-based” liability insurance from Great American Insurance Group for the succeeding policy period, from April 1, 2016 until April 1, 2017.

¹⁷ *See* Ex. F to Mot. (Trans. ID. 66742124).

¹⁸ *Id.*, at ¶ 7.

assignment, the Stipulation further declares that the McCallisters “will not, however, attempt to execute, garnish, or otherwise collect on the Judgments from Life Force....”¹⁹ Following a two-day arbitration in March, the arbitrator awarded the McCallisters \$1,195,742.24 in damages.²⁰

III. PARTIES’ CONTENTIONS

Plaintiffs allege Arch is obligated to pay the judgment on the McCallister Claims because those claims were made during the Extended Reporting Period of the Policy.²¹ According to Plaintiffs, receipt of the January 28, 2016 Notice of Non-renewal letter from Arch, which stated, “[w]e will not renew this policy when it expires,” triggered the automatic Extended Reporting Period and, therefore, Arch was required to indemnify Life Force for any claims made against Life Force through April 1, 2017.²²

In response, as a threshold matter, Arch argues that Pennsylvania law applies to this dispute.²³ Arch then argues that Plaintiffs’ motion should be denied because there are genuine issues of material fact regarding: the non-renewal of the Policy and whether the Extended Reporting Period applies,²⁴ whether Life Force’s notice to

¹⁹ *Id.* at ¶ 4.

²⁰ Ex. G to Mot., at 3.

²¹ Compl., at ¶¶ 28-32.

²² Mot., at 3-4.

²³ Defendant Arch Insurance Company’s Brief in Opposition (“Answering Brief”), at 13-15 (Trans. ID. 66883220).

²⁴ Answering Brief, at 15-20.

Arch regarding the McCallister Claims was timely,²⁵ and whether the Stipulation is prima facie reasonable.²⁶ Last, Arch argues that summary judgment on the enforceability of the Stipulation is premature.²⁷

IV. STANDARD OF REVIEW

Summary judgment is appropriate only if the moving party shows that “there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.”²⁸ “When the evidence shows no genuine issues of material fact in dispute, the burden shifts to the nonmoving party to demonstrate that there are genuine issues of material fact that must be resolved at trial.”²⁹ “All facts are viewed in a light most favorable to the non-moving party.”³⁰ Summary judgment may not be granted if the record indicates that a material fact is in dispute, or if there is a need to clarify the application of law to the specific circumstances.³¹ Where it appears there is a material fact in dispute or that further inquiry into the facts would be appropriate, summary judgment will not be granted.³²

V. DISCUSSION

²⁵ *Id.* at 22-30.

²⁶ *Id.* at 31-32.

²⁷ *Id.*

²⁸ Super. Ct. Civ. R. 56(c).

²⁹ *Tolliver v. U.S. Bank Natal Assan*, 2020 WL 2095830, at *1 (Del. Apr. 29, 2020) (internal quotation marks omitted) (quoting *Grabowski v. Mangler*, 938 A.2d 637, 641 (Del. 2007)).

³⁰ *Preston Hollow Capital LLC v. Nuveen LLC*, 2020 WL 7365808, at *4 (Del. Super. Ct. Dec. 15, 2020) (citing *Burkhart v. Davies*, 602 A.2d 56, 58–59 (Del. 1991)).

³¹ Super. Ct. Civ. R. 56(c).

³² *Ebersole v. Lowe grub*, 180 A.2d 467, 470 (Del. Super. Ct. 1962).

A. Introduction

It is well-established under Delaware law that:

Clear and unambiguous language in an insurance policy should be given its ordinary and usual meaning. Absent some ambiguity, Delaware Courts will not destroy or twist policy language under the guise of construing it. When the language of an insurance contract is clear and unequivocal, a party will be bound by its plain meaning because creating an ambiguity where none exists could, in effect, create a new contract with rights, liabilities and duties to which the parties had not assented.³³

While coverage provisions will be read broadly, exclusion provisions are construed narrowly in favor of coverage.³⁴ “The burden of proving the applicability of any exclusions or limitations on insurance coverage lies with the insurer.”³⁵ When reviewing an insurance policy, the Court will interpret the policy through a reading of the contract as a whole, “and not on any single passage in isolation.”³⁶ An insurance policy is ambiguous when the provisions at issue “are reasonably or fairly susceptible of different interpretations or may have two or more different meanings.”³⁷ An insurance policy is not ambiguous merely because the parties disagree on its proper construction.³⁸

³³ *AT & T Corp. v. Faraday Capital Ltd.*, 918 A.2d 1104, 1108 (Del. 2007).

³⁴ *O'Brien v. Progressive Northern Ins.*, 785 A.2d 281, 287 (Del. 2001).

³⁵ *Altran v. St. Paul Mercury Ins. Co.*, 179 F. Supp. 2d 376, 388 (D. Del. 2002); see *Circa v. National Union Fire Ins. Co. of Pittsburgh, PA*, 2004 WL 1813283, at *4 (Del. Ch.).

³⁶ *O'Brien*, 785 A.2d at 287.

³⁷ *Weiner v. Selective Way Ins. Co.*, 793 A.2d 434, 440 (Del. Super. 2002).

³⁸ *O'Brien*, 785 A.2d at 288.

B. Choice of Law

Courts do not engage in a choice of law analysis unless there is a conflict of law.³⁹ Arch has failed to establish that there is a conflict of law, and, therefore, the Court will not engage a choice of law analysis.

C. The Non-Renewal of the Policy and Whether the Extended Reporting Applies

The Notice on Non-renewal, on Arch's letterhead, is clear and unambiguous, as are the Arch Policy provisions at issue. Pursuant to the express language in Section V(2)(a), if Arch "does not renew for any reason, other than nonpayment of premium," a one year Extended Reporting Period is "automatically provided without an additional premium."⁴⁰ The Extended Reporting Period covers claims for damages caused by a professional incident "made" 12 months after the policy period if the Policy is not renewed.⁴¹ The Policy defines a claim as being "made" when "notice of such claim is received and recorded by any insured or by us, whichever comes first."⁴²

The clear and unambiguous January 18, 2016 Notice of Non-renewal from Arch triggered the automatic one year Extended Reporting Period⁴³, thus extending

³⁹ *Dealey v. Corp. Int'l.*, 8 A.3d 1156, 1161 (Del. 2010).

⁴⁰ Ex. D to Mot., Section V(2)(a).

⁴¹ *Id.*

⁴² Ex. D to Mot., Section I(1)(c).

⁴³ It is undisputed that the reason given for Arch's Non-renewal was not nonpayment of a premium, and this Section V(2)(a) applies. (Had Life Force non-renewed, it would "have a right, upon

policy coverage from April 1, 2016 to April 1, 2017. In this case, a claim made in the 12 months after April, 1 2016 is “deemed to have been made on the last day of the policy period.”⁴⁴

The McCallister complaint was filed on November 4, 2016 and received by Life Force, the insured, later that month. Pursuant to the clear and unambiguous language in Section I(1)(c), the McCallister Claims were “made” when Life Force received it – which was well within the Extended Reporting Period.⁴⁵ Consequently, Arch was required to indemnify Life Force for claims made against it through April 1, 2017.

The Court is not persuaded by Arch’s attempt to create a genuine issue of material fact as to who sent the Notice of Non-renewal. Nowhere in the Notice of Non-renewal is Care Providers mentioned or identified as the non-renewing party.⁴⁶ It is Arch’s, not Care Providers’, letterhead and address on the Notice of Non-renewal.⁴⁷

D. The Stipulation

payment of an additional premium... to a one year Extended Reporting Period” if certain other conditions were met. See Section V(3)(a)).

⁴⁴ Ex. D to Mot., Section I(1)(c).

⁴⁵ Arch’s effort to thwart summary judgment by arguing the notice of the claim was untimely fails. The undisputed facts coupled with the express policy language the claim was “made” within the Extended Reporting Period. Answering Brief, at 22-30.

⁴⁶ Answering Brief, at 19-20.

⁴⁷ Ex. E to Mot.

Arch claims that Plaintiffs have not shown the Stipulation is prima facie reasonable and summary judgment on its enforceability against Arch is “premature at best.” The Court disagrees on both fronts.

Plaintiffs bear the burden of producing evidence that the Stipulation is “prima facie reasonable.”⁴⁸ The burden shifts to the insurer to show, by a preponderance of the evidence, that the agreement “was neither reasonable nor reached in good faith.”⁴⁹ The undisputed facts are that Life Force and the Plaintiffs entered into a Stipulation, that Stipulation included an assignment of rights, the Plaintiffs filed the Stipulation with the Court,⁵⁰ the parties submitted to binding arbitration⁵¹ before a highly experienced and respected arbitrator who has mediated and arbitrated over 12,000 cases,⁵² and the arbitrator awarded damages to the McCallisters.

The type of stipulation entered here is of the same kind reviewed and deemed enforceable by the Court in *Montgomery*. In *Montgomery*, the stipulation at issue contained an admission of liability, an agreement between parties not to execute, and

⁴⁸ *Montgomery v. William Moore Agency*, 2016 WL 1613308, at *1 (Del. Super. Ct. March 31, 2016) (citing *Ayers v. C&D Gen. Contractors*, 269 F.Supp. 2d 911 (W.D.Ky. 2003)). “Prima facie” is defined by Black’s Law Dictionary as “on the face of it.”

⁴⁹ *Id.*

⁵⁰ Ex. F to Mot. (Trans. ID. 66742124).

⁵¹ Arch’s speculation that there could be collusion is not enough, given the record, to avoid summary judgment. Transcript of 12.21.21 Hearing (“12.21.21 Hrg.”), 19:17-20:3 (Trans. ID. 67220808); Answering Brief, at 31-32. See *Brown v. City of Wilmington*, 2019 WL 141744, at *2 (Del. Super. Ct. Jan. 8, 2019) (quoting *In re Asbestos Litigation*, 509 A.2d 1116, 1118 (Del. Super. Ct. 1986) (“On a motion for summary judgment, the Court ‘will not indulge in speculation and conjecture; a motion for summary judgment is decided on the record presented and not on evidence potentially possible.’”).

⁵² The arbitrator is Yvonne T. Saville, Esq.

an assignment of damages. When determining the stipulation's enforceability, the Court noted that the majority of states will deem assignments such as valid "absent specific evidence of collusion between the parties."⁵³ Arch has failed to provide any specific evidence of collusion between the parties, and therefore, the enforceability of the Stipulation is valid.

VI. CONCLUSION

The Plaintiffs have established the Stipulation is prima facie reasonable. For the reasons set forth, the Court finds that there are no genuine issues of material fact in dispute and pursuant to the clear and unambiguous terms of the Policy, Plaintiffs are entitled to judgment as a matter of law on Count One of the Complaint. Plaintiffs' Motion for Partial Summary Judgment on Count One is **GRANTED**.

IT IS SO ORDERED.



Jan R. Jurden, President Judge

cc: Prothonotary

⁵³ *Montgomery*, at *2.